

The Child and the State: Adversaries in the Juvenile Justice System

By
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Did we win or lose?
We won.
Yeah? What did we win?¹

When the child and the state confront each other in the juvenile justice system, no amount of benevolent intentions, studied informality, or euphemistic terminology should be allowed to obscure the fact that they are, in fact, adversaries. What is at stake in juvenile delinquency proceedings is the child's right to liberty and his right to continue in the custody of his parents against the state's power to control crime and enforce morality.

Despite this fact, the juvenile justice system created by legislation in virtually every state was empowered to disregard customary procedures for protecting the accused from the power of the state. It was allowed to employ instead a non-adversary, rehabilitative, parental approach in "treating" children, both those charged with special juvenile offenses² (e.g., incorrigibility, truancy) and those charged with offenses criminal for adults.³

Such a departure was based on good intentions. Reformers anxious to

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1. Conversation between a child and this writer after a successful defense to a charge of burglary in a juvenile delinquency hearing.

2. These special juvenile offenses continue today. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIANS GUIDE TO CRIME CONTROL* 146 (1970):

Conditions included in the various statutory descriptions of delinquent behavior comprise a medley consisting of anything from smoking cigarettes, truancy, sleeping in alleys, and using vulgar language to major felonies such as rape and homicide. Moreover, such vague imprecise and subjective terms as idleness, loitering, waywardness, stubbornness, incorrigibility and immoral conduct are commonly employed.

3. See, e.g., A.M. PLATT, *THE CHILD SAVERS* 137-45 (1969). An excellent study of the history of the juvenile court.

save the children were repelled by the rigidities, technicalities, and harshness in the substantive and procedural criminal law.⁴ They were convinced that youth crime was not a problem of law enforcement but a social—psychological problem of children and their families requiring interventions of a therapeutic nature, involving state interference with and assumption of the parental function of child rearing.⁵ This rationale was reinforced by a legal theory of the state's power to act as *parens patriae* derived improperly from practices of the English courts of chancery.⁶ The lack of formal legal procedures and protections for the children was justified on the ground that nothing "bad" was being done to the children, but rather something "good" was being provided for them. The fact that the result of these proceedings was often the removal of the child from his parents and his placement in an institution was considered a reasonable state extension of parental discipline. The child, never totally at liberty, was simply moved from the inadequate or damaging custody of his parents to the benevolent custody of the state.⁷

Flaws in the system began to show up early. The removal of the child frequently was unjustified, high handed, and cruel.⁸ Since the discretion of a juvenile judge was immense, unlimited by anything but his benevolence, parents and children were literally at his mercy.⁹ The institutions to which the child was removed were, as often as not, overcrowded, regimented, poorly equipped and inadequately staffed detention centers where nothing really rehabilitative was done for the child.¹⁰ "Delinquent" and "neglected" children were often confined together in bleak and impersonal institutions which were constantly criticized and almost never improved. Since a distinctive feature of the juvenile court was indeterminate sentencing, children frequently remained in these institutions for years for nothing more than truancy.¹¹

Though reformist, the juvenile court movement from the beginning had an authoritarian impulse evident both from its belief in the need for firm control of delinquents and its sense of children as helpless depen-

4. See, e.g., F.A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 47-48 (1964).

5. See, e.g., Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); THE CHILD, THE CLINIC AND THE COURT (J. ADDAMS ed. 1925).

6. See, e.g., Cogan, *Juvenile Law Before and After the Entrance of Parens Patriae*, 22 S.C.L. REV. 147 (1970); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971). See also discussion *infra* at 392.

7. See note 5 *supra*.

8. Rendleman, *supra* note 6, at 237-45; A.M. PLATT, *supra* note 3, at 103-04.

9. A rare, early case holding a *parens patriae* commitment to reform school unconstitutional was *People v. Turner*, 55 Ill. 280 (1870), cited in A.M. PLATT, *supra* note 3, at 104.

10. A.M. PLATT, *supra* note 3, at 145-52.

11. *Id.* at 150-51.

dents.¹² Characterized also by middle-class bias, it set high standards of family propriety which it invoked primarily against lower-class families.¹³

As dissatisfaction with the lack of procedural safeguards in juvenile proceedings grew, first the states¹⁴ and then the Supreme Court acted to provide protections. In *In re Gault*,¹⁵ an appeal from a decision in which a 15-year-old boy was sentenced to a state institution until his majority for making a lewd telephone call that he denied making, the Supreme Court at last confronted the claim of the *parens patriae* doctrine that juveniles were outside the constitutional scheme and rejected it. However, it did not overthrow the juvenile court system, nor indeed, many other aspects of *parens patriae*. The Court carefully confined its holding to the adjudicatory phase of confinement. For this phase it did not demand exact conformity with adult criminal procedural safeguards but only a standard of "fundamental fairness" combined with four specific procedural protections: the right to adequate and timely notice, confrontation of witnesses, counsel,¹⁶ and the privilege against self-incrimination. Later, in *In re Winship*,¹⁷ the Court carefully added to the list of specific safeguards the requirement of proof beyond a reasonable doubt. However, in *McKeiver v. Pennsylvania*¹⁸ the Court refused to add the right to a jury trial. Because the Court was explicitly concerned that such a right would "... remake the juvenile proceeding into a fully adversary process . . . ending what has been the idealistic prospect of an intimate, informal, protective proceeding,"¹⁹ it held that a jury trial was not an essential element of "fundamental fairness."

The language of the Court in the progression of decisions from *Gault* to *McKeiver* shows an increasing fear that the importation of procedural safeguards into the juvenile system will destroy that system by making it fully adversary.²⁰ This concern with the adversary problem is a shift from

12. See, e.g., A.M. PLATT, *supra* note 3, at 135-36. Some social scientists today stress the need for programs that provide autonomy, responsibility and a sense of competence in rehabilitating delinquent adolescents. Wheeler, Cottrell & Romasco, *Juvenile Delinquency: Its Prevention and Control*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 416 (1967). (Hereinafter called TASK FORCE REPORT.)

13. *Id.*

14. See, *In re Gault*, 387 U.S. 1, 13 (1967).

15. 387 U.S. 1 (1967).

16. *Id.*, at 13. It is regrettable that the right to counsel was confined to the adjudicatory phase. Counsel is crucial to fairness at the intake and dispositional phases of juvenile proceedings as well.

17. 397 U.S. 358 (1970).

18. 403 U.S. 528 (1971).

19. *Id.*, at 545.

20. *In re Winship*, 397 U.S. 358, 366 (showing concern for "the informality, flexibility or speed of the hearing at which the fact-finding takes place.") *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (quoted in the text), 550 (relating delay, formality, and clamor to the adversary system).

the reasoning in the *Gault* decision. There the Court stressed that some elements of adversary proceedings in juvenile court were necessary, but that they would leave untouched other distinctive benefits of the juvenile system such as separate treatment of juvenile offenders,²¹ no classification as a criminal,²² no civil disability or disqualification for civil service appointment as a result of conviction,²³ confidentiality of the proceedings,²⁴ and the presence of "kindly" juvenile judges.²⁵ *Gault* also noted that much informality could be retained as well, but questioned its value.²⁶ The later decisions bring back for the legal profession a set of questions that had seemed largely laid to rest by the reasoning in *Gault*. Is the functioning of the juvenile court threatened by vigorous adversary fact-finding, and, if so, what is the meaning of the child's right to counsel?

It is, in truth, an old set of questions. Juveniles had counsel before *Gault*, and the resulting problems were extensively discussed then.²⁷ *Gault's* emphasis on the need for counsel had apparently only qualified, not abolished, the pervasive paternalistic approach of the juvenile courts. *Parens patriae* lingers on, obscuring the adversary relation of the court and the child, despite its historical irrelevancy and its danger to libertarian values.

The protective power of the sovereign as *parens patriae* exercised by the courts of chancery in equity is not the historical basis for power over troublesome children. In English practice, misbehaving children were prosecuted, if at all, under the criminal laws. The chancellors invoked the equitable doctrine of *parens patriae* only in resolving disputes between private parties over guardianship and property matters affecting "infants and idiots" who were deemed to be incapable of caring for themselves.²⁸

The juvenile court's delinquency jurisdiction derives from the criminal law,²⁹ and the Elizabethan Poor Laws (and their American counterparts) relating to the control of paupers and their children.³⁰

As Morris and Hawkins have observed:

Historical idiosyncracies gave us a doubtful assumption of power over children. With the quasi-legal concept of *parens patriae* to brace it, this assumption of power blended well with the earlier

21. See, 387 U.S. at 22.

22. *Id.*, at 23.

23. *Id.*, at 24.

24. *Id.*

25. *Id.*, at 27.

26. *Id.*, 25-27.

27. See, e.g., THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES, COUNSEL FOR THE CHILD (1966). This is a symposium on the role of the lawyers in Juvenile Court together with an extensive bibliography.

28. Rendleman, *supra* note 6.

29. See, R. POUND, INTERPRETATIONS OF LEGAL HISTORY 134-35 (1923).

30. Rendleman, *supra* note 6.

humanitarian traditions in the churches and other charitable organizations regarding child care and child saving. The juvenile court is thus the product of paternal error and maternal generosity, which is a not unusual genesis of illegitimacy.³¹

The point is not that the juvenile courts have no legal right to exist. It is rather that their claim to be free of the need for an adversary balancing of interests is based on their asserted identity of interest with the child. They argue that the *parens patriae* approach to juvenile delinquency cases removes the apparent conflict between the misbehaving child's desire for liberty and his "obvious" need for corrective custody and guidance, by asserting that the court does not deprive children of a right to liberty, but rather grants them the right to parental care and discipline.³² The history of the court reveals, however, that it has always been concerned with the identification and control of wayward children as much in the interests of public order as in the interests of the children.³³ Whatever its benevolent intentions, the juvenile system's concern for the "best interests" of the child has been clearly affected by the demands made upon it to deal with the crime problem posed by juveniles.³⁴ Roughly half of the serious crimes in the United States are committed by children of juvenile court age, although this age group constitutes less than one-fifth of the total population.³⁵ Responsibility for dealing with the problem of crime is as much that of the juvenile courts as it is of adult criminal courts. Indeed, one of the main functions of the juvenile justice system is law enforcement.³⁶

31. N. MORRIS & G. HAWKINS, *supra* note 2, at 157.

32. See, e.g., Mack, *supra* note 5.

33. A.M. PLATT, *supra* note 3, at 137-41.

34. F.A. ALLEN, *supra* note 4, at 43-50.

35. 118 *Congressional Record* (daily ed. February 8, 1972), S. 1331 (remarks of Senator Birch Bayh).

Mr. President, juvenile crime in this country is reaching crisis proportions. During the past decade, arrests of juveniles for violent crimes increased by 148 percent, and arrests of juveniles for property crimes, such as burglary and auto theft, jumped 85 percent.

I am deeply alarmed by these rapidly accelerating arrest rates for young people. But I am even more alarmed by the fact the juveniles now represent almost half the crime population in this country. Children between the ages of 10 and 17 compose only 16 percent of the national population, yet they account for more than 48 percent of all arrests for serious crimes. And the problem is even worse than the figures indicate, because a larger proportion of adult arrests for serious crimes are those we failed to rehabilitate as young offenders.

Our dismal failure to rehabilitate is dramatically clear from the recidivism rate for juvenile delinquents estimated at 74 percent to 85 percent. Our attempts to redirect young lives by the traditional means of incarceration in large training schools simply do not work; they succeed only in producing more sophisticated, more alienated young criminals.

36. TASK FORCE REPORT 1 (1967):

The juvenile court has become the primary judicial agency for dealing with

Furthermore, the fallacy of any easy analogy of the state's role to that of the parent is immediately pointed up by the state's own interest in the control and discipline of disruptive youth. There is a fundamental difference between a parent's disciplining a child by placing limits on his behavior and the state's punishing the child by imposing sanctions such as arrest, detention, prosecution, stigmatization, probation and institutionalization. Parents may not imprison children; the state can and does.³⁷ State institutions for children are notoriously far from home-like.³⁸ The state, as parent, subjects the child to cultural influences that may be both foreign and unacceptable to the real parent and even to the child.³⁹ Intervention in family life is destructive of family solidarity, which is frequently of more importance to minorities and the poor than those in power are willing to admit.⁴⁰ The state's concept of itself as parent can lead to the idea that it should assume custody of children whose parents are unconventional by dominant community standards.⁴¹ These are all considerations of great social and political sensitivity, exposing the dangers inherent in *parens patriae*.

Constitutional interpretation has consistently recognized that the parents' claim to authority in the rearing of their children is basic to our society.⁴² It is also clear that the state has an independent interest in protecting the welfare of children and safeguarding them from abuses.⁴³ Certainly in the adjustment of these two interests our political commitment to the value of individual liberty demands scrupulous procedural safeguards for individual rights. This is particularly true now that we are

juvenile criminality, the singlemost pressing and threatening aspect of the crime problem in the United States. One in every nine children will be referred to juvenile courts for an act of delinquency before his 18th birthday. Considering boys alone, the ratio is one in every six. Arrests of persons under 18 for serious crimes increased 47 percent in 1965 over 1960; the increase in that age group population for the same period was 17 percent. In 1965 persons under 18 referred to juvenile court constituted 24 percent of all persons charged with forcible rape, 34 percent of all persons charged with burglary, 45 percent of all persons charged with larceny, 61 percent of all persons charged with auto theft. It is apparent that responsibility for meeting the problems of crime rests more heavily on no other judicial institution.

37. *Id.*, at 6.

38. *Id.*, at 23.

39. See e.g., Rendleman *supra* note 6.

40. *Id.*, at 205-06, making reference to *Dandridge v. Williams*, 397 U.S. 471 (1970), in which the Supreme Court found acceptable the "attenuation" of parent-child relationships resulting from state welfare legislation that indirectly promoted the farming out of children in large, poor families to relatives.

41. *Id.*, at 252-53. See, Book Review, Katz, *When Parents Fail*, 4 COLUM. HUMAN RIGHTS L. REV. 497 (1972).

42. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 639, 640, 641 (1967).

43. *Id.*; see also, Paulsen, *The Legal Framework of Child Protection*, 66 COLUM. L. REV. 679 (1966).

witnessing a massive shift from private to public efforts to provide child protective services and an increasing push to make them universally available.⁴⁴ Easy analogies of the state to the parent will not and should not serve to legitimize the state's power over children. If such a rationale is relied on, it seems reasonable to expect those affected by that power, frequently the nation's newly militant poor, to confront it in court and demand that the state's performance be as parental as advertised.⁴⁵ Perhaps we will see an increase in the number of cases using the writ of habeas corpus to free juveniles from confinement in institutions demonstrably not rehabilitative or parental.⁴⁶

The expressed concern of the Supreme Court for allowing the benevolent experiment of the juvenile justice system to go on without the clamor, formality and delay of a fully adversary proceeding may or may not be warranted. But any impairment of the freedom of defense counsel to wage a vigorous adversary defense should be firmly opposed. It is a serious political problem that many in the juvenile justice system and many lawyers neither accept nor understand that the state and the child are in fact adversaries in juvenile delinquency cases, and that regardless of the benevolent intentions of the judge, probation officers and institutional personnel, involuntary "treatment" of young offenders as a "cure" for their misbehavior and rebellious tendencies is to those who do not wish to receive it nothing less than punishment, a coercive exercise of the police power of the state.

Apparently, despite *Gault*, the right to counsel is viewed as an unnecessary safeguard in many juvenile courts. Two post-*Gault* studies revealing widespread waiver of the right to counsel found that most of the waivers by children and parents were uninformed and inadvertent.⁴⁷ The court involved had simply failed to give proper, adequate and unprejudiced notice that the state would provide counsel if the parents could not afford it.⁴⁸ One recent study found that attorneys were present in

44. Paulsen, *supra* note 43, at 710.

45. *Id.*, at 709.

46. This line of attack is suggested in Weiss, *Defense of a Juvenile Court Case*, in 2 CRIMINAL DEFENSE TECHNIQUES (R.M. CIPES ed. 1969) 60-15. He cites *Fulwood v. Stone*, 394 F.2d 939 (D.C. Cir. 1967). See also, reasonable statutory purpose cases, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *Nebbia v. New York*, 291 U.S. 502 (1924); and *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972).

47. See, Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969); Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORD. L. REV. 375, 376-80 (1971).

48. For example, the court's language frequently downplayed the need for counsel, failed to advise that free counsel was available, or showed the court's impatience with the idea of counsel. For a holding that a lower court's failure to give proper notice of right to counsel resulted in an invalid waiver of the right, see *In re Ella B.*, 30 N.Y.2d 352, — N.E.2d — (1972).

only 24% of the juvenile delinquency cases in a particular jurisdiction.⁴⁹ Another study of 24 counties, in states where children were allowed jury trials, found that in 2 of those counties there were lawyers in only 50% of the cases, in 6 other counties, in less than 25% of the cases, and in another 3 counties in less than 10%.⁵⁰

Only in jurisdictions where the public defender or "law guardian" system operates in the juvenile courts are children assisted by counsel as a matter of course. In such jurisdictions there remain built-in problems for vigorous adversary defense because the defender is an employee of the system with a continuing close relationship to the bench and probation officers.⁵¹ It would be preferable for a pool of community based lawyers to be available for such work, but the practice generally does not pay well, and the most able members of the Bar usually know nothing about the procedures in the juvenile court system.⁵² Even the experienced criminal lawyer must adapt to the informality, lack of standards, less stringent rules of evidence, child-saving rhetoric and other imponderables.⁵³

In cases where juvenile counsel is present, lingering and unwarranted trust by counsel and others in unchallenged benevolence continues to complicate counsel's performance and effectiveness.⁵⁴ The hostility of the courts, legislators and commentators to an adversary approach in juvenile court is widespread.⁵⁵ The advocate faces long-held assumptions that the necessary fact-finding can be done better by trained social workers and paternalistic judges than by lawyers out to "beat the rap" for their clients.⁵⁶

Counsel must not only contend with hostility. He or she shares the general confusion over the nature of children's rights, which has been only partly allayed by court decisions. Although the Supreme Court stated in *Gault* that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," further language in *Gault* and opinions else-

49. Ferster, Courtless & Snethen, *supra* note 47, at 386, n.65.

50. *Id.*

51. See e.g., A.M. PLATT, *supra* note 3, at 168-72.

52. *Id.*, 165-67.

53. See Weiss, *supra* note 46, for an excellent, detailed and practical guide to effective counselling in the post-Gault juvenile court.

54. See Steinfeldt, Kerper & Friel, *The Impact of the Gault Decision in Texas*, 20 JUV. CT. JUDGES J. 154 (1969) discussed and cited in Ferster, Courtless & Snethen, *supra* note 47, at 388.

55. A.M. PLATT, *supra* note 3, at 165.

56. *Id.* Fact-finding solely by the inquisitorial rather than the adversary method has a long history of fallibility in juvenile court. See the discussion *infra* at 397. However, it is also true that adversary fact-finding breaks down. It breaks down completely when counsel has information not otherwise available to the court that the child is guilty but does not offer it. In such a case, the adversary system is justified primarily as a control on state power and not as a fact-finding method. Our system of criminal law has traditionally chosen to put the control of state power first, despite the fact that some of the guilty get away. See ABA Canons of Professional Ethics No. 5. This choice is equally appropriate in the juvenile system.

where make it clear that children so far are not the constitutional equivalents of adults.⁵⁷

Effective advocacy is also hindered by the role conflict inevitable in a system in which individuals may be subjected to involuntary treatment and the deprivation of liberty for their own good. "The basis of the adversary system is the separation of roles . . ."⁵⁸ and yet the structure of the juvenile court system requires that the judge act as judge, prosecutor and protector,⁵⁹ the probation officer as social worker, investigator and law enforcement officer,⁶⁰ and the defense attorney as both advocate and guardian.⁶¹

If we are truly concerned about "fundamental fairness" to the child in juvenile court proceedings, and adequately sensitive to the need for standards and controls on the state's power to intervene in private lives, it is difficult to escape the conclusion that the juvenile court must move away from attitudes and practices which dilute the adversariness of the proceedings.

Whatever else is needed in the juvenile court system, and reforms of many kinds are called for, one clear need is for accurate fact-finding. Neither surmise nor conjecture is an adequate basis for governmental interference with liberty. The question of what facts need to be shown in juvenile court is unsettled.⁶² The court's concern for rehabilitation has focused its attention not only on the commission of specific acts but on facts of the juvenile's total personality and its interaction with the environment.⁶³ Whatever the focus, fact-finding is the primary task of the adjudicatory phase of the juvenile court proceedings. One-sided investigations by social workers and police have led to reports which contain questionable data. Juveniles' social files, often introduced at the adjudicatory hearing, typically contain rumor, gossip and prejudicial school and probation reports,⁶⁴ as well as psychiatric reports full of professional jargon that impresses judges.⁶⁵ Psychiatric testing done under court auspices has produced results which differ significantly and prejudicially from test results obtained by defense

57. 387 U.S. at 13. See e.g., *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 515 (1969) (Justice Stewart concurring).

58. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WISC. L. REV. 7, 43.

59. See e.g., Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 297-309 (1967).

60. TASK FORCE REPORT, *supra* note 12, at 6.

61. See, e.g., Note, *supra* note 59, at 327; Dyson & Dyson, 9 J. FAM. L. 1, 58 (1969).

62. For a discussion of the issues, see F.A. ALLEN, *supra* note 4, at 18-22.

63. A.M. PLATT, *supra* note 3, at 141-42.

64. See e.g., Note, *supra* note 59, at 337-38.

65. Lemert, *The Juvenile Court—Quest and Realities*, TASK FORCE REPORT *supra* note 12, at 103.

experts.⁶⁶ No judge should be expected to weigh such evidence without help from adversary challenge and the presentation of a case for the defense.⁶⁷ If the long history of the common law has illustrated that full adversary proceedings are necessary for the protection of adults in criminal proceedings, how can we deny that protection to the juvenile facing delinquency charges and incarceration?⁶⁸ Indeed, since the broad discretion of the juvenile court in defining delinquency and in setting sentence lengths poses special threats, should not the juvenile have greater protection than adults?⁶⁹

Full adversary proceedings do not mean that counsel must employ a rigidly technical approach, bitterly contesting every point and issue. The adversary system has always had room for compromise according to the client's best interest. Our adversary system does not "... excessively seek for truth, but rather seek[s] to strike a decent balance between the quantum of proof of guilt and the values of individual freedom."⁷⁰ The need for full adversariness probably does mean, however, that there must be clearer role separation in the juvenile courts, a skeptical approach to benevolent pretensions, and vigorous and scrupulous deference by counsel to the wishes of his client, the child.⁷¹

Some lawyers believe that it is not possible to counsel, relate to, and represent a child as one does an adult. There are, of course, situations involving children of very young age, or limited intelligence, who will not understand legal proceedings. The lawyer's role in such cases might more nearly approach that of guardian than advocate, but even in such cases he should put the state to its proof. The exchange quoted at the outset of this article took place between the writer and a nine year old child after a trial in which he was found innocent of burglary. When it was explained

66. Dyson & Dyson, *supra* note 61, at 59-61.

67. See e.g., Handler, *supra* note 58, at 49; Note *supra* note 58, at 336. But see dicta of Justice White concurring in *McKeiver v. Pennsylvania*, 403 U.S. at 550, expressing remarkable trust in the juvenile court's ability to avoid prejudgment in such a situation.

68. See e.g., Dissent of Justice Douglas in *McKeiver v. Pennsylvania*, 403 U.S. at 559.

69. TASK FORCE REPORT, *supra* note 12, at 23: Juveniles receive "... not infrequently . . . sanctions more severe than those an adult would receive for like behavior"

70. N. MORRIS & G. HAWKINS, *supra* note 2, at 161.

71. For reports and discussion on the role of defense counsel in the juvenile system at or since the time of the *Gault* decision, see generally, N. LEFSTEIN & V. STAPLETON, COUNSEL IN JUVENILE COURTS: AN EXPERIMENTAL STUDY, NATIONAL COUNCIL OF JUVENILE COURT JUDGES (1967); Stapleton, *A Social Scientist's View of Gault and a Plea for the Experimenting Society*, 1 YALE REV. OF L. & SOC. ACTION 72 (1970); Wizner, *Juvenile Justice and the Rehabilitative Ideal: A Response to Mr. Stapleton*, 1 YALE REV. OF L. & SOC. ACTION 82 (1970); Teitelbaum, *Gault and the "Experimenting Society": A Response to Mr. Stapleton*, 1 YALE REV. OF L. & SOC. ACTION 86 (1970); Wizner, *The Defense Counsel: Neither Father, Judge, Probation Officer, or Social Worker*, 7 TRIAL, September/October 1971, at 30.

to him what he had "won" was a decision that he "didn't do it" he replied, "but I *didn't* do it." Obviously, the arresting officer, intake worker and prosecutor did not believe him, and only by cross examination of the state's witnesses, and testimony of witnesses in support of the child's story, did the matter reach a just result. The child clearly did not comprehend all that was going on in the trial, but he benefited from the result.

Most youngsters, however, do understand what is at stake in juvenile delinquency proceedings. They understand that they are in trouble, why they are in trouble, and what can happen to them once they are found to be juvenile delinquents. They are not too innocent to play the role of criminal defendant.⁷² Most children charged with juvenile delinquency wish to be "acquitted," or to get the lightest "sentence" possible, even if supervision, counselling treatment or institutionalization promises to benefit them.⁷³ The lawyer should certainly act as an interpreter of the juvenile court to the child, trying to make as clear as possible to him the significance, both good and bad, of what might happen to him there. But it is not counsel's role, necessarily, to achieve for the child what the counsel or judge or prosecutor thinks is best for him. The lawyer's role is to be the child's advocate, to give mature, articulate, intelligent and persuasive voice to the child's expressed wishes with respect to the "best" outcome of the case.

Gault provided the right to counsel as the principal check on the abuses of *parens patriae*.⁷⁴ If counsel limits the defense of the child because of *parens patriae* assumptions that the court and the child are not adversaries, that check is undermined. Counsel indeed becomes part of the problem instead of part of the solution. If the presence of independent counsel is "the keystone of the whole structure of guarantees that a minimum system of procedural justice requires,"⁷⁵ then counsel must vigorously maintain an independent stance. He or she must speak unequivocally for the child's legal rights.⁷⁶ The child's right to be heard requires no less.

72. N. MORRIS & G. HAWKINS, *supra* note 2, at 163-64:

"... [S]ome experience with children's courts and juvenile institutions leads one rapidly to eschew the belief in the innate innocence of children. Indeed, when one includes the incompetent, the decrepit, and the lost characters that form so much of the grist of the mill of adult courts, one might suspect that there is a lesser quantum of responsibility per hundred in adult cases than in juvenile cases."

73. This conclusion, a fairly obvious one, is based on the writer's own experience and that of numerous lawyers of his acquaintance who represent children in delinquency cases.

74. 367 U.S. at 38 & n.65.

75. TASK FORCE REPORT, *supra* note 12, at 32, quoted in 367 U.S. at n.65.

76. This view has been adopted by juvenile court public defenders in San Leandro, California, *see* Note, *supra* note 59, at 327 & n.246, and by the "Law Guardians" serving New York juvenile courts. Dyson & Dyson, *supra* note 60. For a description of the difficulties of public defenders serving as both social workers and advocates, *see* Platt, Schechter & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619 (1968).

